4.1 Equal Pay Act[74]

[Updated: 6/14/02]

Pattern Jury Instruction

In this case [plaintiff] claims that [defendant] violated a federal law known as the Equal Pay Act.

Under that Act it is unlawful for an employer to discriminate between employees on the basis of sex by paying different wages to employees of different sexes working in jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions.

In order to prevail on this claim, [plaintiff] must prove each of the following elements by a preponderance of the evidence:

> First, that [plaintiff] and [male/female] workers have been employed by [defendant][75] in jobs requiring substantially equal skill, effort and responsibility;[76]
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> Second, that the jobs are performed under similar working conditions; and
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> Third, that [plaintiff] was paid a lower wage than the [male/female] workers in jobs that require substantially equal skill, effort and responsibility as [plaintiff]'s job and that are performed under similar working conditions.

In deciding whether jobs require substantially equal skill, effort and responsibility, your task is to compare the jobs, not the individual employees holding those jobs. It is not necessary that the jobs be identical; the law requires proof that the performance of the jobs demands "substantially equal" skill, effort and responsibility. Insignificant and insubstantial or trivial differences do not matter and may be disregarded. Job classifications, descriptions or titles are not controlling.[77] The important thing is the actual work or performance requirements of the jobs.

In deciding whether the jobs require substantially equal "skill," you should consider such factors as the level of education, experience, training and ability necessary to meet the performance requirements of the respective jobs.

In deciding whether the jobs require substantially equal "effort," you should consider the amount of physical and mental exertion needed for the performance of the respective jobs. Duties that result in mental or physical fatigue and emotional stress, or factors that alleviate fatigue and stress, should be weighed together in assessing the relative effort involved. It may be that jobs require equal effort in their performance even though the effort is exerted in different ways on the jobs; but jobs do not entail equal effort, even though they involve most of the same routine duties, if one job requires other additional tasks that consume a significant amount of extra time and attention or extra exertion.

In deciding whether the jobs involve substantially equal "responsibility," you should consider the degree of accountability involved in the performance of the work. You should take into

consideration such things as the level of authority delegated to the respective employees to direct or supervise the work of others or to represent the employer in dealing with customers or suppliers; the consequences of inadequate or improper performance of the work in terms of possible damage to valuable equipment or possible loss of business or productivity; and the possibility of incurring legal liability to third parties.

In deciding whether jobs are performed under similar working conditions, the test is whether the working conditions are "similar"; they need not be substantially equal. In deciding whether relative working conditions are similar, you should consider the physical surroundings or the environment in which the work is performed, including the elements to which employees may be exposed. You should also consider any hazards of the work including the frequency and severity of any risks of injury.

[78]{If you find that [plaintiff] has proven [his/her] claim, you will then consider [defendant]'s defense. [Defendant] contends that the differential in pay between the jobs was the result of a bona fide [seniority system; merit system; system which measures earnings by quantity or quality of production; or describe factor other than sex[79] upon which the defendant relies]. On this defense, [defendant] has the burden of proof by a preponderance of the evidence. If you find that [defendant] has met this burden, then your verdict will be for [defendant].}

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[74] This instruction is designed for Equal Pay Act cases. The Introductory Notes at the beginning of these instructions outline the statutory basis for an Equal Pay Act claim.

There is currently a split among the circuits (and the First Circuit has steadfastly avoided taking a position) about the relationship between an EPA claim and a Title VII wage discrimination claim. See Rodriguez v. Smithkline Beecham Pharm., P.R., Inc., 62 F. Supp. 2d 374, 381-82 (D.P.R. 1999) (Title VII and EPA) (Pieras, J.) (outlining the issue and the circuit split) aff'd, Rodriguez v. Smithkline Beecham, 224 F.3d 1, 8 (1st Cir. 2000) (Torruella, C.J.) (noting the issue but declining to take a position); see also Dragon v. Rhode Island Dep't of Mental Health, Retardation and Hosps., 936 F.2d 32, 37 (1st Cir. 1991) (Title VII and EPA) (Breyer, C.J.) (same); Marcoux v. Maine, 797 F.2d 1100, 1105-06 (1st Cir. 1986) (Title VII) (Campbell, C.J.) (same). The issue centers on the defendant's burden of proof after the plaintiff establishes his or her prima facie case. See Rodriguez, 62 F. Supp. 2d at 382. Under the EPA, the defendant bears both the burden of production and the burden of persuasion with respect to the statutory defenses. In a Title VII case, on the other hand, once the defendant meets its burden of articulating (producing) non-discriminatory reasons for the challenged employment action, the plaintiff bears the burden of proving that those reasons are merely pretextual. However, Title VII explicitly incorporates any defenses authorized by the EPA. See 42 U.S.C. § 2000e-2(h) (2001) ("It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the EPA]."). The question, then, is whether this statutory incorporation of the EPA defenses should affect only the substantive defenses, or whether it should also affect the allocation of burdens of proof.

There is also at least one limitation on an EPA claim that does not apply to a Title VII sex-based wage discrimination claim. See Marcoux, 797 F.2d at 1104 (EPA requirement that plaintiff work in same establishment as opposite-sex employee who is paid more does not apply to Title VII case).

[75] At this point in the instruction, it might be necessary to address the issue of whether the defendant is the plaintiff's employer within the meaning of the EPA. See 29 U.S.C. § 203(d) (2001) (An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."); see also 29 U.S.C. § 213. In most cases this will not be necessary because whether a defendant is an employer is a legal rather than factual question. If, however, there are factual issues that must be resolved before that legal determination can be made, this instruction should be modified accordingly. See, e.g., Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 678 (1st Cir. 1998) (FLSA) (Lipez, J.) ("[W]e must determine whether the Board's factual findings, which are not disputed on appeal, support its legal conclusion that Harold and Marlene are 'employers,' within the meaning of the Act.").

[76] See, e.g., Marcoux v. Maine, 797 F.2d 1100, 1107-08 (1st Cir. 1986) (Title VII) (Campbell, C.J.) (analyzing the comparability of work by female guards at one prison and male guards at another).

[77] Rodriguez v. Smithkline Beecham, 224 F.3d 1, 7 (1st Cir. 2000) (Title VII and EPA) (Torruella, C.J.) ("Although job titles may be given some weight in determining whether two employees hold substantially equal positions, the EPA's emphasis is on the responsibilities and functions of the position.").

[78] Appropriate portions of this bracketed paragraph may be used if the defendant argues that any of the four statutory defenses is applicable.

[79] See, e.g., Rodriguez v. Smithkline Beecham, 224 F.3d 1, 6 (1st Cir. 2000) (Title VII and EPA) (Torruella, C.J.) ("[S]tanding company policies designed . . . to protect employees' salary and grade levels during developmental placements [or] to allow the company to utilize employees at lower level positions without detriment to the employee's compensation . . . are 'factors other than sex' . . . and therefore constitute a legitimate basis for wage differentials."); Byrd v. Ronayne, 61 F.3d 1026, 1034 (1st Cir. 1995) (Title VII and EPA) (Cyr, J.) (fact that one employee generated substantially greater revenues than another constituted "factor other than sex" justifying pay differential); Winkes v. Brown, 747 F.2d 792, 795-96 (1st Cir. 1984) (EPA) (Aldrich, J.) (defendant that is subject to a consent decree requiring it to hire more women cannot be penalized under the EPA for taking steps to retain female employee where those steps were consistent with established policy of matching offers made to employees by competitors).